Finally, full disclosure and notice of transfers under the *de minimis* exception should be submitted to the Commission and made available to all providers to limit ILEC abuse.

III. FCC Should Adopt Measures To Improve CLEC Collocation And Unbundling

In CIX's view, functional collocation and unbundling processes are absolute necessities if CLECs are to deploy underlying telecommunications capability that better serves customers and ISPs. CIX agrees wholeheartedly with ALTS and many other CLEC commenters that the Commission should establish national rules to revamp the existing collocation and UNE processes. Under either the integrated or the separate subsidiary model, competition must not be merely a theoretical possibility resting at or between the words of the Commission's orders. Rather, it must be as ubiquitous in the market as the ILECs' networks are today. The Commission's goal in this proceeding should be to make the terms of collocation and unbundling so clear that the days of ILEC stymieing are over.

CIX fully supports ALTS' position that CLECs should be permitted to collocate cost-efficient equipment, including switching and multiplexing equipment. The clear intent of the Commission's Local Competition Order was not to halt the progress of equipment integration of switching functions. To the contrary, the 1996 Act and the Commission's order intended for local exchange competition to generate new services and better ways of providing existing services. Technological evolution, therefore, was an intended by-product of the promotion of

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[25] http://www.uswest.com/com/disclosures/netdisclosure403/index403.html.

competition, and reduces the costs of competitive entry. The Commission should clarify that such equipment which integrates switching functions can be collocated in central offices.[26]

CIX also supports more flexible collocation options for CLECs such as virtual collocation and cageless collocation, which can reduce the costs of entering a given central office and provide for more efficient use of central office space. In CIX's view, where virtual collocation is necessary, ILECs should endeavor to provide competing providers with space that is of close proximity to the central office facility, especially since xDSL services are distance sensitive. Obviously, the separate affiliate should be charged and treated in the same manner as any other CLEC provided with virtual collocation.

While CIX believes that all CLECs should be afforded equal opportunity to obtain collocation, there may be instances in which not all providers can be accommodated. NPRM, at ¶¶ 146-49. In such cases, CIX believes that two rules of priority are necessary to ensure that the collocation process serves competition. First, where three independent CLECs are not already collocated, the ILEC-affiliated CLEC should not be permitted equal space and should be removed (if necessary) to provide new entrant competition into the market. This protects against ILEC favoritism, and prevents the affiliated-CLEC (which is likely to be collocated early-on)

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[26] The NPRM (at ¶ 129) correctly proposes that "if an incumbent LEC chooses to establish an advanced services affiliate, the incumbent must allow competitive LECs to collocate equipment to the same extent as the incumbent allows its advanced services affiliate to collocate equipment in order to meet its existing obligation to provide collocation on nondiscriminatory terms and conditions." In order to ensure that the data affiliate is not unreasonably advantaged by the transfer of embedded equipment, the Commission should make clear -- as it is proposing in the context of switching equipment (id. at ¶ 131) -- that an advanced services affiliate should not be permitted to collocate its data equipment if there is only enough room at the central office or remote terminal for one CLEC.

from consuming available space in the central office to the detriment of competing providers. Second, collocation space for DCAPs should be given highest priority. As discussed infra (at I(B)(4)), DCAPs can serve a critical role to promote competition and cost-based pricing among ISPs, to enhance real customer choice of ISP service, and to prevent discrimination against independent ISPs.[27]

Loop unbundling, including xDSL-capable loops, is also a prerequisite if CLECs and ISPs are to deliver a range of diverse Internet-based services. In the MO&O (at ¶ 52) the Commission properly affirmed its decision in the Local Competition Order that unbundled local loops should be provisioned to competitors in a way that allows CLECs to use them for data services, including xDSL. Loops with a variety of electronic impediments (i.e., bridged taps, loading coils, etc.) are not suitable for xDSL services and, since it is the ILEC's obligation to offer unbundled loops, the ILEC must condition those loops appropriately. Otherwise, the ILEC itself would be able to effectively control the pace of competition, and prevent CLECs from rolling out xDSL services by refusing to condition loops until it, or its affiliate, makes a decision to offer xDSL to a given customer. It is plainly offensive to the 1996 Act to leave it up to the ILEC to control when, how, or if a competing provider gains access to customers.

Loop unbundling also promotes more efficient and diverse advanced services to end-users in other ways. For example, unbundling can offer CLECs (and ISPs) access to the physical network layer, and strip away whatever higher-level "layering," regional transport, or content decisions that the ILEC, or its affiliate, may have bundled in to its retail service offering. Without these constraints, CLECs and ISPs can offer service packages and make technical

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[27] To the extent that DCAP equipment may deemed "enhanced service" equipment, it

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decisions that are tailored to the end-user's actual demand. For example, the ILEC's ADSL offerings are undoubtedly assymetic and offered through a regional transport network because the ILEC does not want to offer a less expensive service in competition with its own T1 andT3 offerings. End-user demand and choice may have little to do with the ILEC's decision-making on ADSL. CLECs and ISPs, however, can offer attractive alternatives for end-users that have different Internet and data demands not met by the ILECs' offerings. Thus, if subloop unbundling can offer more network access to competitors that is free from the ILEC's other service decisions, it is undoubtedly in the interests of end-user choice and competitive pricing to require such unbundling.

Spectrum management issues present another area where the Commission must take a proactive stance to avoid ILEC decisions designed to stop CLEC competition, which are positioned as technical constraints of the network. Lack of spectrum management means that a customer would have to purchase a second line to connect to the CLEC's data service offering, while the ILEC's own voice and data service is offered as a bundled package over a single line. Obviously, once the ILEC forces every competitor onto a second line, the customer will rationally choose to avoid the second-line expense and opt for the ILEC bundled service. This is a classic example of the ILEC using monopoly facilities – the multiplexers – to squeeze out competition. In CIX's view, the ILEC must unbundle and resell the voice service to all unaffiliated CLECs on a nondiscriminatory basis. No CLEC should be placed at a competitive disadvantage due to ILEC claims of the technical unfeasibility of adding CLEC data and ILEC

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should be provided with full collocation rights. NPRM at ¶ 132.

voice service onto a single loop. If those limitations exist, then the ILEC (and its affiliate) should not be permitted to offer voice and data service on a bundled basis.

Remote terminals and the use of digital loop carrier systems present similar competitive issues. In CIX's view, if the ILEC or its affiliate has access to remote terminals, and is able to provide xDSL from that terminal, then that same access should be provided to all competitors. If the ILEC claims that only it (or its affiliate) can deploy at the remote terminal, then the ILEC and its affiliate should be precluded from selling data service to the customer until it can be offered in a manner that opens that loop to competition.

IV. FCC Should Strongly Enforce Access Rights Of Competing Providers

It is critical for the Commission to take measures now that provide swift and effective enforcement of the Communications Act and the Commission's orders promoting a competitive market for advanced services. Enforcement is critical for the protection of both the Internet market and the CLEC market. As discussed above, the potential for abuse and vertical integration persists under the integrated approach or the separate affiliate approach. Once the Commission has reformed and clarified the laws, the ILECs must be held responsible for full compliance.

The evidence already presented by CLECs demonstrates that ILECs simply will not comply in a fulsome way with the existing collocation and unbundling rules, and tend to distort or ignore the plain meaning of the Commission's orders. From an ISP perspective, the ONA and CEI safeguards have devolved into paper processes only, which have not been enforced in a meaningful way for ISPs to gain access to the underlying telecommunications elements in an

efficient manner. As a starting point, CIX urges the Commission to apply its Second R&O[28] accelerated process to CLEC and ISP complaints that raise issues of advanced services deployment and ILEC compliance with access obligations.[29] As the Commission noted, the accelerated complaint process is intended to effectuate the provisions of the 1996 Act and "this new docket is to stimulate real competition among market participants."[30]

The Commission should also adopt ILEC performance standards allowing the Commission and the industry to monitor the progress of ILEC compliance.[31] These standards should establish regular reporting and performance requirements (e.g., semi-annual) on (a) ILEC services demanded (including collocation, unbundling, lines (xDSL, T1, T3, and ISDN)); (b) central office space availability, loop conditioning, and ILEC (or affiliate) xDSL deployment; (c) ISP ordering of ONA services; (d) ILEC response times to provisioning requests by affiliated and unaffiliated providers, and maintenance problems encountered for each; (e) the number of informal complaints from other providers regarding services or delays. Moreover, this information should be provided on a state-by-state basis so that state regulators and the public are aware of which ILEC units are implementing local network demands, and which are not.

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28 "Amendment of the Commission's Rules Regarding Procedures to be Followed When Formal Complaints are Filed Against Common Carriers," Second Report & Order, CC Dkt. No. 96-238, FCC 98-154 (rel. July 14, 1998) (the "Second R&O").

29 See MO&O, ¶ 55.

30 Id. at ¶ 1, 18.

31 These performance standards could be integrated with the proposed Commission surveys and data collection on the state of local and exchange access competition. See, "Common Carrier Bureau Seeks Comment on Local Competition Survey," Public Notice, CC Dkt. No. 91-141, CCB-IAB File No. 98-102 (rel. May 8, 1998).

Because the ILECs have had difficulty with accurate accounting practices,[32] the ILEC report should be audited by an independent auditor and the Common Carrier Bureau should engage in its own audit review of such ILEC reports.

V. Wholesale Resale Obligations Should Apply to the ILEC's Advanced Telecommunications Services.

CIX agrees with the Commission's tentative conclusion (NPRM at ¶ 188) and the MO&O (at ¶ 60, 61) that the wholesale resale obligations of Sec. 251(c)(4) of the Act apply to "any telecommunications service" sold at retail by the ILEC to non-telecommunications carriers. 47 U.S.C. § 251(c)(4).

Arguments that the Section 251(c)(4) obligations do not apply to such services as DSL fail for several reasons. First, ADSL services are not an "exchange access" service; it is a local telecommunications service that modifies and obtains additional bandwidth out of the existing local loop.[33] Second, unlike traditional exchange access, ADSL service is not offered for telecommunications carriers: the ILECs' tariffs and related pleadings carefully explain that the service is expected to be purchased by end-users such as ISPs and the customer end-user. Because Section 251(c)(4) applies to "any telecommunications service that the carriers provides

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32 See e.g., "Commission Releases Federal/State Joint Audit Report of GTE," NEWS Report No. CC 98-6 (rel. Mar. 18, 1998) (Joint Board finds that 36% of GTE's plant equipment was either missing or could not be verified); Second Report and Order, CC Dkt. No. 93-162, 12 FCC Rcd. 18730 (1997) (FCC finds that ILECs have overcharged for expanded interconnection rates).

33 See Comments of CIX to ILECs' Direct Cases, CC Dkt. Nos. 98-161, 98-103, 98-79 (filed Sept. 18, 1995).

at retail to that are not telecommunications carriers," the wholesale resale obligation applies to the ILEC's ADSL services.

Finally, CIX believes that, under the ILEC integrated approach, the wholesale resale method can be an important way for CLECs to offer competitive alternatives in markets which are simply too thin to justify the deployment of facilities-based DSL equipment.

VI. FCC Should Maintain RBOC LATA Restrictions And Better Enforce The Statutory Mandates Preventing In-Region InterLATA Internet Services

The NPRM (at ¶¶ 193-95) asks whether a process of LATA modification requests should permit RBOCs to carry aggregated Internet communications across LATA boundaries to Internet network access points ("NAPs"). CIX opposes such a process because it is fundamentally inconsistent with the Section 271 interLATA restrictions.

A Section 3(25) LATA "modification" is not an appropriate vehicle for permitting premature RBOC entry into the interLATA marketplace. 47 U.S.C. §153(25). As a matter of law and policy, Congress established the clear statutory scheme permitting RBOC participation in the interLATA markets, including Internet communications, only after the RBOC complies with the Section 271 checklist and Section 272 safeguards. Neither the language nor the purpose of Section 3(25) suggests that Congress authorizes the Commission to override the Section 271/272 process.

The interLATA NAP proposal flatly contradicts the 1996 Act. InterLATA relief that permits RBOCs to function as a replacement for other Internet backbone providers "effectively eviscerate[s] section 271 and circumvent[s] the procompetitive incentives for opening the local

market to competition that Congress sought to achieve in enacting section 271 of the Act."[34] Section 271(a) of the Act prohibits the RBOCs from engaging in interLATA information and telecommunications, except when the RBOC has met the express terms of the statute. The Commission is not empowered to nullify the express statutory proscription by weighing it against a perceived need for RBOC interLATA lines to Internet NAPs.

Other statutory provisions reinforce that Congress meant for the Commission to strictly enforce the interLATA restrictions. For example, Section 10(d) of the Act forbids the Commission from any act of forbearance from Section 271 "until it determines that those [section 271] *requirements have been fully implemented.*"[35] Despite the goal for advanced services deployment, Section 706 does not conflict with, or supercede, the Section 271 restrictions. Indeed, the Commission has explained that Section 706 was "adopted contemporaneously with" the Section 10 proscription and that "Congress was well aware of the explicit exclusions of our forbearance authority in section 10(d)."[36] Moreover, Congress did address the interLATA NAP issue with the *limited* "incidental interLATA services" exception for Internet services to "elementary and secondary schools."[37] To expand the terms of this limited exception, by taking up the proposed *ad hoc* LATA "modification" requests, would

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34 MO&O, at ¶ 82.

35 47 U.S.C. § 160(d).

36 MO&O, at ¶ 75.

37 47 U.S.C. § 271(g)(2).

effectively override the express limitations Congress established in Section 271(g)(2).[38] Thus, the Commission may not simply trade away the Section 271/272 proscriptions in an effort to achieve some other goal.

CIX also finds that the goal of securing high-speed Internet-based services for all Americans would not be furthered by permitting RBOC entry into the interLATA business before the Section 271 competitive checklist has been met. Not only would such premature interLATA entry have a negative impact on the interLATA markets due to the RBOCs' monopolization of the local loops and access, but it also undercuts the RBOCs' incentives to improve local competition. Finally, if the Commission is committed to let competition reign in competitive markets, then it must resist the temptation to intervene based on RBOC claims that somehow the competitive market has gone askew.

CONCLUSION

CIX encourages the Commission to regulate ILEC services in a manner that promises consumer choice and diversity of services. Under the integrated approach, this demands that the Commission establish forceful regulatory oversight. With the separate affiliate approach,

38 See MCI v. AT&T, 114 S.Ct. 2223 (1994) (the term "modify" means to change moderately or in a minor fashion, not to rewrite the statutory plan).

competition is the consumer's best protection, so long as the Commission ensures a truly separate affiliate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 1998, a copy of the foregoing Comments were mailed, postage prepaid, first class mail to the following:

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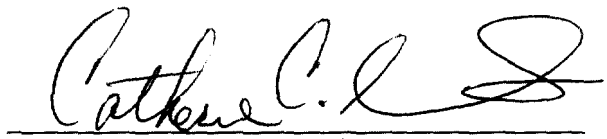

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